

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

RODNEY EMIL,

Case No. 3:02-cv-00311-MMD-WGC

Petitioner,

ORDER

v.

RENEE BAKER, *et al.*,

Respondents.

I. INTRODUCTION

In this habeas corpus action, the respondents have filed an answer (dkt. no. 69), responding to each of the claims in the third amended habeas corpus petition (dkt. no. 49) of the petitioner, Rodney Emil. The answer raises procedural issues, concerning the applicable statute of limitations and alleged procedural defaults, and also responds to Emil's claims on their merits. Emil has, in turn, replied (dkt. no. 78).

The Court will deny all the claims in Emil's third amended petition, as all his claims are barred by the statute of limitations or the procedural default doctrine, or both. The Court will deny Emil a certificate of appealability. The Court will direct the Clerk of the Court to enter judgment accordingly.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Emil was charged together with Todd Leavitt (Leavitt) for the murder of [Ross] Tolley (victim). The State adduced evidence that Emil was present when the victim was bludgeoned with a hammer and conflicting evidence that either Emil shot the victim to death or that Emil was present when Leavitt shot the victim to death. Emil's defense was that he was not

1 present in the State of Nevada when the murder occurred. The jury
2 rejected Emil's alibi and found Emil guilty of first degree murder.

3 Order Dismissing Appeal, Respondents' Exhibit 4, p. 1.¹

4 The judgment of conviction, for murder with the use of a deadly weapon, was
5 entered on February 9, 1988, in Nevada's Eighth Judicial District Court, in Clark County,
6 Nevada. Judgment of Conviction, Petitioner's Exhibit 26. Emil was sentenced to life in
7 prison without the possibility of parole, for the murder, and a consecutive sentence of
8 life in prison without the possibility of parole, for use of the deadly weapon. *Id.*

9 The Nevada Supreme Court dismissed Emil's direct appeal on April 25, 1989.
10 Order Dismissing Appeal, Respondents' Exhibit 4.

11 On March 14, 1990, Emil filed a post-conviction petition for writ of habeas corpus
12 in the state district court. Petition for Post-Conviction Relief, Respondents' Exhibits 5
13 (petition), 6 (amended petition). The state district court denied that petition on
14 December 18, 1990. Findings of Fact, Conclusions of Law and Order Denying Post-
15 Conviction Relief, Respondents' Exhibit 7. Emil appealed, and the Nevada Supreme
16 Court dismissed the appeal on September 30, 1991. Order Dismissing Appeal,
17 Respondents' Exhibit 8.

18 On November 8, 1991, Emil initiated a federal habeas action, *Emil v. Proconier*,
19 Case Number CV-S-91-0872-LDG-RJJ. See Petition for Writ of Habeas Corpus,
20 Respondents' Exhibit 9. That action apparently was dismissed without prejudice, as
21 Emil's claims were not fully exhausted. See Answer (dkt. no. 69), pp. 5-6.

22 In April 1997, Emil, initially acting *pro se*, initiated this federal habeas corpus
23 action, which was at that time designated case number CV-N-97-0245-DWH. See
24 Petition for Writ of Habeas Corpus, Respondents' Exhibit 10. On November 12, 1998,

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26 ¹In this order the exhibits identified as respondents' exhibits are those filed by
27 respondents on November 14, 2011, in support of their answer, and found in the record
28 at dkt. no. 70. The exhibits identified as petitioner's exhibits are those filed by petitioner
on January 27, 2011, in support of his third amended habeas petition, and found in the
record at dkt. no. 49.

1 after counsel was appointed to represent Emil, Emil filed an amended habeas petition.
2 See Amended Petition for Writ of Habeas Corpus, Respondents' Exhibit 11; see also
3 dkt. nos. 43, 46 in case number CV-N-97-0245-DWH. On May 10, 1999, the court
4 granted Emil's motion to hold his case in abeyance pending exhaustion of claims in
5 state court, and the case was therefore stayed. Order entered May 10, 1999,
6 Respondents' Exhibit 12.

7 On July 8, 1999, Emil initiated a second state-court post-conviction habeas
8 corpus action. See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13. In an
9 order entered February 3, 2000, the state district court denied that petition on
10 procedural grounds, as untimely under NRS 34.726, and as improperly successive
11 under NRS 34.810. See Findings of Fact, Conclusions of Law and Order, Respondents'
12 Exhibit 14. Emil appealed, and the Nevada Supreme Court affirmed on December 4,
13 2001. See Order of Affirmance, Respondents' Exhibit 16.

14 On March 13, 2002, Emil filed a motion to lift the stay in this case (dkt. no. 51 in
15 case no. CV-N-97-0245-DWH). The court granted that motion, and lifted the stay on
16 May 31, 2002 (dkt. no. 1). The case was then assigned a new case number, the current
17 case number for the case, 3:02-cv-00311-MMD-WGC. On July 5, 2002, Emil filed a
18 new petition under the new case number (dkt. no. 2).

19 On August 2, 2002, Emil filed a motion requesting that this case be held in
20 abeyance pending the conclusion of discovery proceedings in another federal habeas
21 corpus action brought by Emil, case number CV-N-00-0654-DWH, in which Emil
22 challenges a separate Nevada conviction and his death sentence on that conviction
23 (dkt. no. 3). The respondents filed a notice of non-opposition (dkt. no. 5), and on
24 December 6, 2002, the court granted Emil's motion, and stayed this case pending
25 completion of discovery proceedings in case number CV-N-00-0654-DWH (dkt. no. 6).
26 On December 23, 2004, the court entered a minute order noting that discovery
27 proceedings had been completed in case number CV-N-00-0654-DWH, and ordering

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1 Emil to file an amended petition (dkt. no. 18). On December 20, 2005, Emil filed an
2 amended habeas petition (dkt. no. 26).

3 On May 26, 2006, upon a stipulation of the parties, the action was again stayed
4 to allow Emil to further exhaust claims in state court (dkt. no. 31).

5 On July 10, 2006, Emil filed a third post-conviction petition for writ of habeas
6 corpus in state court. Petition for Writ of Habeas Corpus, Respondents' Exhibit 25. The
7 state district court denied the petition on procedural grounds. Emil appealed, and the
8 Nevada Supreme Court affirmed on September 24, 2009. Order of Affirmance,
9 Respondents' Exhibit 26 (and Petitioner's Exhibit A).

10 The stay of this case was then lifted (dkt. no. 46), and on January 27, 2011, Emil
11 filed his third amended petition for writ of habeas corpus (dkt. no. 49),² which is now the
12 operative petition in this case. Respondents filed their answer on November 14, 2011
13 (dkt. no. 69). Emil filed his reply on March 28, 2012 (dkt. no. 78).

14 **III. STATUTE OF LIMITATIONS**

15 **A. Application of the Statute of Limitations, Generally**

16 In their answer, respondents assert that many of the claims in Emil's third
17 amended petition are barred by the applicable statute of limitations. See Answer (dkt.
18 no. 69), pp. 42-47.

19 Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),
20 there is a one-year statute of limitations applicable to federal habeas corpus petitions.

21 The statute provides:

22 (d)(1) A 1-year period of limitation shall apply to an application for a writ of
23 habeas corpus by a person in custody pursuant to the judgment of a State
24 court. The limitation period shall run from the latest of –

25 ²Emil filed his original petition in April 1997, and subsequent amended petitions
26 on November 12, 1998; July 5, 2002; December 20, 2005; and January 27, 2011. The
27 January 27, 2011, petition, therefore, might more accurately be considered a fourth
28 amended petition. However, the Court refers to it in this order, as Emil's counsel does,
consistent with the title in the caption on the petition, as Emil's third amended petition.
The Court refers to Emil's prior amended petitions by reference to the dates on which
they were filed.

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1)(A-D).

For convictions that became final prior to the enactment of the AEDPA, such as Emil's, the petitioner had until April 24, 1997, to file a federal habeas corpus petition. *See Patterson v. Stewart*, 251 F.3d 1243, 1246 (9th Cir. 2001).

The habeas petitioner is entitled to statutory tolling of the limitations period while a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

The AEDPA limitations period is also subject to equitable tolling. *Holland v. Florida*, 560 U.S. 631, 649 (2010). A petitioner may be entitled to equitable tolling if he can show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Emil initiated this action just days before the limitations period ran out. The court received his *pro se* petition on April 29, 1997, five days after expiration of the limitations period. *See* Petition for Writ of Habeas Corpus, Respondents' Exhibit 10; *see also* dkt. no. 8 in case number CV-N-97-0245-DWH. However, the petition was apparently signed by Emil on April 22, 1997, and respondents do not challenge Emil's claim that he delivered it to prison authorities for mailing on that date. *See id.*; *see also* Answer, pp. 42-43. Therefore, the Court treats the original petition in this action as having been

1 timely filed, two (2) days before expiration of the one-year limitations period. See
2 *Houston v. Lack*, 487 U.S. 266, 275-76 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222
3 (9th Cir.2001)(“Under the ‘prison mailbox rule’ of *Houston v. Lack* ... a prisoner’s federal
4 habeas petition is deemed filed when he hands it over to prison authorities for mailing to
5 the district court.”).

6 The AEDPA limitations period is not tolled during the pendency of the federal
7 habeas corpus action itself. *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001) (“We hold
8 that an application for federal habeas corpus review ... did not toll the limitations period
9 during the pendency of ... [the] federal habeas petition.”).

10 Emil did not amend his original petition in this action until November 12, 1998.
11 See Amended Petition for Writ of Habeas Corpus, Respondents’ Exhibit 11; see also
12 dkt. nos. 43, 46 in case number CV-N-97-0245-DWH. Without some sort of tolling,
13 Emil’s November 12, 1998, amended petition; his July 5, 2002, amended petition; his
14 December 20, 2005, amended petition; and his January 27, 2011, third amended
15 petition were all filed after expiration of the AEDPA limitations period.

16 A habeas petition “may be amended ... as provided in the rules of procedure
17 applicable to civil actions.” 28 U.S.C. § 2242. Under Federal Rule of Civil Procedure
18 15, amendments made after the statute of limitations has expired relate back to the date
19 of the original pleading if “the claim ... asserted in the amended pleading arose out of
20 the conduct, transaction, or occurrence set forth or attempted to be set forth in the
21 original pleading.” Fed. R. Civ. Pro. 15(c) (2). Applying Rule 15(c) in the habeas
22 context, the Supreme Court, in *Mayle v. Felix*, 545 U.S. 644 (2005), held that new
23 claims brought in an amended habeas petition relate back to the filing of a previous
24 petition, for purposes of the AEDPA statute of limitations, only if the amended and
25 original claims arise out of a common core of operative facts. *Mayle*, 545 U.S. at 659,
26 664. “An amended habeas petition ... does not relate back (and thereby escape
27 AEDPA’s one-year time limit) when it asserts a new ground for relief supported by facts
28 that differ in both time and type from those the original pleading set forth.” *Id.* at 650;

1 see also *Ha Van Nguyen v. Curry*, 736 F.3d 1287 (9th Cir.2013) (observing that the
2 “time and type” language in *Mayle* refers not to grounds for relief but to facts supporting
3 habeas claims).

4 Therefore, absent tolling, the claims asserted in Emil’s third amended petition are
5 barred by the statute of limitations unless they relate back, individually, under Federal
6 Rule of Civil Procedure 15(c) and *Mayle*, to claims in Emil’s April 1997 petition.

7 Emil argues that he is entitled to equitable tolling. He argues, in this regard, that
8 he was misled by Ninth Circuit precedent regarding the application of Federal Rule of
9 Civil Procedure 15(c) in habeas cases. Reply (dkt. no. 78), pp. 28-30. The Ninth Circuit
10 precedent that Emil alleges was misleading is the Ninth Circuit Court of Appeals’
11 decision in the *Mayle* case itself: *Felix v. Mayle*, 379 F.3d 612 (9th Cir.2004), reversed
12 in *Mayle v. Felix*, 545 U.S. 644 (2005). Emil argues that “[u]nder the Ninth Circuit test
13 set forth in *Mayle*, Emil was entitled to expect that the claims he diligently pursued and
14 prepared in his First Amended Petition would relate back to his *pro per* petition,
15 because these additional claims involved the same ‘transaction or occurrence’ as that
16 set forth in the original petition – Emil’s conviction and sentence.” Reply, p. 29. But that
17 argument is plainly without merit; the Ninth Circuit Court of Appeals did not decide *Felix*
18 *v. Mayle* until August 9, 2004, some seven (7) years after the expiration of the
19 limitations period applicable to Emil’s federal habeas petition. To the extent that Emil
20 points to non-habeas precedent in the Ninth Circuit, and claims he was misled by that
21 (see Reply, p. 28), his argument is not compelling. Emil cites no authority holding that
22 such precedent misled habeas petitioners with respect to the operation of the AEDPA
23 statute of limitations, such that equitable tolling is warranted.

24 Emil also argues that he is entitled to equitable tolling on account of this Court’s
25 scheduling orders, or on account of the respondents’ adherence to and litigation under
26 those scheduling orders (see Reply, pp. 25-30). That argument is also without merit.
27 Emil has not pointed to anything in any order of this Court suggesting that claims filed
28 after the expiration of the AEDPA limitations period would be considered timely.

1 **B. Application of the Statute of Limitations to Emil's Individual Claims**

2 **1. Claim 1**

3 In Claim 1 of his third amended habeas petition, Emil claims that his federal
4 constitutional rights were violated "because the jury foreman presided while unfit for jury
5 service," in that "a motion to revoke his probation hung over his head throughout the
6 trial." Third Amended Petition (dkt. no. 49), p. 5.

7 The Court finds that this claim and Ground 3 in Emil's timely-filed 1997 habeas
8 petition arise from a common core of operative facts. See Petition for Writ of Habeas
9 Corpus, Respondents' Exhibit 10, Ground 3. Claim 1, therefore, relates back to the filing
10 of the 1997 petition, and is not barred by the statute of limitations.

11 **2. Claim 2**

12 In Claim 2, Emil claims that his federal constitutional rights were violated when
13 the trial court "instructed the jury on the state's theory of aiding and abetting," because
14 "[t]he trial court allowed the state to argue that theory even though the state failed to
15 provide any pre-trial notice of prosecution for aiding and abetting." Third Amended
16 Petition, p. 7.

17 Respondents concede, and the Court finds, that this claim and Ground 1 in
18 Emil's timely-filed 1997 habeas petition arise from a common core of operative facts.
19 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 10, Ground 1. Claim 2,
20 therefore, is not barred by the statute of limitations.

21 **3. Claim 3**

22 In Claim 3, Emil claims that his federal constitutional rights were violated
23 because the prosecution, in violation of the rules of *Napue v. Illinois*, 360 U.S. 264
24 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), "instructed Joseph Henslick to
25 testify falsely and provided benefits for that testimony." Third Amended Petition, p. 11.

26 The Court finds that this claim and Ground 2 in Emil's timely-filed 1997 habeas
27 petition arise from a common core of operative facts – the assertion that Emil's
28 conviction, in whole or in part, depended upon perjured testimony of Joseph Henslick.

1 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 10, Ground 2. Claim 3,
2 therefore, is not barred by the statute of limitations.

3 **4. Claim 4**

4 In Claim 4, Emil claims that his federal constitutional rights were violated
5 because his trial counsel rendered ineffective assistance "when he neglected Mr. Emil's
6 case prior to trial and refused to ask appropriate and productive questions during trial."
7 Third Amended Petition, p. 17. There are seven subclaims in Claim 4: (1) that counsel
8 "refused to examine witnesses on topics Mr. Emil suggested" (*id.* at 17); (2) that counsel
9 "refused questions about the orange truck" (*id.*); (3) that counsel "refused to develop a
10 description of Bobby Little's gun" (*id.* at 19); (4) that counsel "refused to object to
11 testimony from Ken Bono" (*id.* at 20); (5) that counsel "refused to object to hearsay
12 testimony from Terry Bono" (*id.* at 21); (6) that counsel "refused to cross-examine Victor
13 Gramrosa for bias" (*id.* at 22); and (7) that counsel "refused to collect Lefevre's jail
14 records prior to trial" (*id.* at 23).

15 In his 1997 petition, Emil did include, as Ground 4, a claim of ineffective
16 assistance of trial counsel. See Petition for Writ of Habeas Corpus, Respondents'
17 Exhibit 10, Ground 4. However, for the most part, that claim simply asserted a legal
18 theory; Emil pled little in the way of operative facts to support it. See *id.*

19 The one specific factual allegation that Emil made in Ground 4 of the 1997
20 petition is as follows:

21 ... Emil requested trial counsel file a Motion to Suppress as to the
22 testimony of Kenneth Bono pursuant to a *Messiah* issue. Trial counsel
failed to file this meritorious issue.

23 *Id.* This Court reads the reference to "Messiah" as a reference to *Massiah v. United*
24 *States*, 377 U.S. 201 (1964), in which the Supreme Court held that a defendant's Sixth
25 Amendment right to counsel is violated when the government introduces statements
26 deliberately elicited by a government agent from an indicted defendant outside the
27 presence of defense counsel. In Claim 4, in his third amended habeas petition, to the
28 extent he faults his trial counsel for not objecting to the testimony of Kenneth Bono, Emil

1 relies upon a different theory, supported by facts not alleged in the 1997 petition. See
2 Third Amended Petition, pp. 20-21. In the third amended petition, Emil claims that Bono
3 coerced him into making a statement, by threatening him, and that his trial counsel
4 should have raised an objection o Bono's testimony based on *Schaumberg v. State*, 83
5 Nev. 372, 432 P.2d 500 (1967) (to be admissible as evidence, a confession must be
6 made freely, voluntarily and without compulsion or inducement, whether made to a
7 police officer or a private person).

8 Claim 4 does not arise from the same core of operative facts as Ground 4 in
9 Emil's 1997 petition, or any other claim in that petition. Claim 4, therefore, is barred by
10 the statute of limitations.

11 5. Claim 5

12 In Claim 5, Emil claims that his federal constitutional rights were violated
13 because his trial counsel rendered ineffective assistance "when he failed to support Mr.
14 Emil's alibi with documentary proof from Merlin Leavitt and with evidence of weather
15 conditions." Third Amended Petition, p. 26.

16 Emil argues that this claim relates back to Ground 4 of his 1997 petition (see
17 Reply, p. 38), but that argument is without merit. No facts in support of any such claim
18 of ineffective assistance of counsel were pled in Ground 4 of the 1997 petition. See
19 Petition for Writ of Habeas Corpus, Respondents' Exhibit 10, Ground 4.

20 Claim 5 does not arise from the same core of operative facts as Ground 4 in
21 Emil's 1997 petition, or any other claim in that petition. Claim 5 is barred by the statute
22 of limitations.

23 6. Claim 6

24 In Claim 6, Emil claims that his federal constitutional rights were violated
25 because his trial counsel rendered ineffective assistance "when he failed to file a motion
26 to preclude the prosecutor from eliciting testimony regarding the 'bad acts/crimes'
27 allegedly committed by Mr. Emil's alibi witness which were not relevant to the
28 'truthfulness' of the alibi witness." Third Amended Petition, p. 31.

1 Here again, Emil argues that this claim relates back to Ground 4 of his 1997
2 petition (see Reply, p. 38), but that argument is without merit. There were no facts pled
3 in support of any such claim of ineffective assistance of counsel in Ground 4 of the 1997
4 petition. See Petition for Writ of Habeas Corpus, Respondents' Exhibit 10, Ground 4.

5 Claim 6 does not arise from the same core of operative facts as Ground 4 in
6 Emil's 1997 petition, or any other claim in that petition. Claim 6 is barred by the statute
7 of limitations.

8 **7. Claim 7**

9 In Claim 7, Emil claims that his federal constitutional rights were violated
10 because "[t]he state charged Mr. Emil in the Tolley case to gain a tactical advantage in
11 the Charles Emil case...." Third Amended Petition, p. 34.

12 Emil makes no argument that this claim relates back to the 1997 petition, and the
13 Court observes that no such claim appears in the 1997 petition. See Petition for Writ of
14 Habeas Corpus, Respondents' Exhibit 10; see *also* Reply, pp. 36-40.

15 Claim 7 does not arise from the same core of operative facts as any claim in
16 Emil's 1997 petition. Claim 7 is barred by the statute of limitations.

17 **8. Claim 8**

18 In Claim 8, Emil claims that his federal constitutional rights were violated
19 because "[t]he trial court admitted gruesome photographs" into evidence at trial. Third
20 Amended Petition, p. 38.

21 Emil makes no argument that this claim relates back to the 1997 petition, and the
22 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
23 Habeas Corpus, Respondents' Exhibit 10; see *also* Reply, pp. 36-40.

24 Claim 8 does not arise from the same core of operative facts as any claim in
25 Emil's 1997 petition. Claim 8 is barred by the statute of limitations.

26 **9. Claim 9**

27 In Claim 9, Emil claims that his federal constitutional rights were violated
28 because "[t]he state destroyed exculpatory evidence to gain a tactical advantage...."

1 Third Amended Petition, p. 40. Specifically, Emil asserts in this claim that “[d]etectives
2 for the Las Vegas Metropolitan Police Department knowingly destroyed, prior to trial,
3 two audio tapes and all notes that preserved exculpatory information from interviews of
4 state’s key witness Ken Bono.” *Id.* at 40-41.

5 Emil makes no argument that this claim relates back to the 1997 petition, and the
6 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
7 Habeas Corpus, Respondents’ Exhibit 10; see *also* Reply, pp. 36-40.

8 Claim 9 does not arise from the same core of operative facts as any claim in
9 Emil’s 1997 petition. Claim 9 is barred by the statute of limitations.

10 **10. Claim 10**

11 In Claim 10, Emil claims that his federal constitutional rights were violated
12 because “[t]he state failed to disclose potential exculpatory evidence.” Third Amended
13 Petition, p. 44. Specifically, Emil asserts in this claim that the prosecution failed to
14 disclose to the defense that witness Martin Koba was a confidential informant and that
15 he was paid \$2000 to testify. *Id.* at 44-46.

16 Emil makes no argument that this claim relates back to the 1997 petition, and the
17 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
18 Habeas Corpus, Respondents’ Exhibit 10; see *also* Reply, pp. 36-40.

19 Emil argues, however, that Claim 10 is timely, under 28 U.S.C. § 2244(d)(1)(B),
20 because the claim was timely raised after he discovered the factual predicate of the
21 claim. See Reply, pp. 38-39. Petitioners invoking section 2244(d)(1)(B) must satisfy a
22 high burden. See *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th Cir.2009) (petitioners
23 invoking 28 U.S.C. § 2244(d)(1)(B) “must satisfy a far higher bar than that for equitable
24 tolling”). Emil does not show that he is entitled to relief from the statute of limitations
25 under section 2244(d)(1)(B). Emil does not allege, or proffer evidence to establish,
26 when and how he first discovered the factual predicate for Claim 10. See Reply, pp. 38-
27 39. Nor does Emil allege, or proffer evidence to establish, the date on which the factual
28 predicate of Claim 10 could have been discovered through the exercise of due

1 diligence. See 28 U.S.C. § 2244(d)(1)(D). Emil appears to argue that, simply because
2 Claim 10 is a claim made under *Brady v. Maryland*, 373 U.S. 83 (1963), section
3 2244(d)(1)(B) automatically applies and saves the claim from the operation of the
4 statute of limitations; Emil cites no authority for that proposition.

5 Claim 10 is barred by the statute of limitations.

6 **11. Claim 11**

7 In Claim 11, Emil claims that his federal constitutional rights were violated
8 because “[t]he trial court refused to instruct on the lesser included and related offenses
9 of conspiracy to commit murder, battery, and accessory after the fact even though
10 evidence in the record supported such convictions and trial counsel explicitly waived the
11 statute of limitations.” Third Amended Petition, p. 46.

12 Emil makes no argument that this claim relates back to the 1997 petition, and the
13 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
14 Habeas Corpus, Respondents’ Exhibit 10; see also Reply, pp. 36-40.

15 Claim 11 does not arise from the same core of operative facts as any claim in
16 Emil’s 1997 petition. Claim 11 is barred by the statute of limitations.

17 **12. Claim 12**

18 In Claim 12, Emil claims that his federal constitutional rights were violated
19 because “[t]he trial court instructed the jury on reasonable doubt in a manner that
20 minimized the state’s burden of proof....” Third Amended Petition, p. 48.

21 Emil makes no argument that this claim relates back to the 1997 petition, and the
22 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
23 Habeas Corpus, Respondents’ Exhibit 10; see also Reply, pp. 36-40.

24 Claim 12 does not arise from the same core of operative facts as any claim in
25 Emil’s 1997 petition. Claim 12 is barred by the statute of limitations.

26 **13. Claim 13**

27 In Claim 13, Emil claims that his federal constitutional rights were violated
28 because “[t]he trial court instructed the jury to do ‘equal and exact justice’ between the

1 state and Mr. Emil, which reduced the state's burden of proof” Third Amended
2 Petition, p. 50.

3 Emil makes no argument that this claim relates back to the 1997 petition, and the
4 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
5 Habeas Corpus, Respondents’ Exhibit 10; see also Reply, pp. 36-40.

6 Claim 13 does not arise from the same core of operative facts as any claim in
7 Emil’s 1997 petition. Claim 13 is barred by the statute of limitations.

8 **14. Claim 14**

9 In Claim 14, Emil claims that his federal constitutional rights were violated
10 because “[t]he trial court failed to properly instruct the jury on the elements of first
11 degree murder....” Third Amended Petition, p. 51.

12 Emil makes no argument that this claim relates back to the 1997 petition, and the
13 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
14 Habeas Corpus, Respondents’ Exhibit 10; see also Reply, pp. 36-40.

15 Emil argues, however, that Claim 14 is timely, because it “rests upon newly
16 available Ninth Circuit case law in *Polk v. Sandoval*, 503 F.3d 903 (2007). See Reply,
17 pp. 34-36, 39-40. The record, however, shows that argument to be misleading at best.
18 In Emil’s untimely 1998 amended petition, which was filed more than eight (8) years
19 before the *Polk* decision, Emil asserted, as Claim 15 in that amended petition, a claim
20 nearly identical to Claim 14. See Amended Petition for Writ of Habeas Corpus,
21 Respondents’ Exhibit 11, pp. 45-48. Plainly, Emil was able to articulate this claim before
22 the *Polk* decision was decided in 2007.

23 Claim 14 is barred by the statute of limitations.

24 **15. Claim 15**

25 In Claim 15, Emil claims that “[e]xtensive prosecutorial misconduct and
26 overreaching distorted the fact-finding process, rendered the trial fundamentally unfair
27 ...” and violated his federal constitutional rights. Third Amended Petition, p. 55.

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1 Emil makes no argument that this claim relates back to the 1997 petition, and the
2 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
3 Habeas Corpus, Respondents' Exhibit 10; see *also* Reply, pp. 36-40.

4 Claim 15 does not arise from the same core of operative facts as any claim in
5 Emil's 1997 petition. Claim 15 is barred by the statute of limitations.

6 **16. Claim 16**

7 In Claim 16, Emil claims that his federal constitutional rights were violated
8 because "[t]he trial court refused to record significant portions of trial which denied Mr.
9 Emil meaningful appellate review...." Third Amended Petition, p. 58.

10 Emil makes no argument that this claim relates back to the 1997 petition, and the
11 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
12 Habeas Corpus, Respondents' Exhibit 10; see *also* Reply, pp. 36-40.

13 Claim 16 does not arise from the same core of operative facts as any claim in
14 Emil's 1997 petition. Claim 16 is barred by the statute of limitations.

15 **17. Claim 17**

16 In Claim 17, Emil claims that his federal constitutional rights were violated
17 because "[a]ppellate counsel rendered ineffective assistance." Third Amended Petition,
18 p. 60. Emil claims that his appellate counsel "unreasonably failed to litigate the facts
19 and legal issues enunciated [in] claims No. 6 through 8, part of 11 and 12 through 16
20 and 18...." *Id.*

21 Emil makes no argument that this claim relates back to the 1997 petition, and the
22 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
23 Habeas Corpus, Respondents' Exhibit 10; see *also* Reply, pp. 36-40.

24 Claim 17 does not arise from the same core of operative facts as any claim in
25 Emil's 1997 petition. Claim 17 is barred by the statute of limitations.

26 ///

27 ///

28 ///

1 **18. Claim 18**

2 In Claim 18, Emil claims that “[t]he trial court’s admission of hearsay violated the
3 federal constitutional guarantees of due process, effective assistance of counsel, right
4 to confrontation and cross-examination.” Third Amended Petition, p. 61.

5 Emil makes no argument that this claim relates back to the 1997 petition, and the
6 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
7 Habeas Corpus, Respondents’ Exhibit 10; see *a/so* Reply, pp. 36-40.

8 Claim 18 does not arise from the same core of operative facts as any claim in
9 Emil’s 1997 petition. Claim 18 is barred by the statute of limitations.

10 **19. Claim 19**

11 In Claim 19, Emil claims that his federal constitutional rights were violated
12 because his trial counsel rendered ineffective assistance because “counsel failed to
13 challenge the testimony of Ken Bono with the testimony of Dr. Green....” Third
14 Amended Petition, p. 62.

15 Emil argues that this claim relates back to Ground 4 of his 1997 petition (see
16 Reply, p. 38), but that argument is without merit. In Ground 4 of the 1997 petition, with
17 regard to the testimony of Kenneth Bono, Emil made only the following claim that his
18 trial counsel was ineffective:

19 ... Emil requested trial counsel file a Motion to Suppress as to the
20 testimony of Kenneth Bono pursuant to a Messiah issue. Trial counsel
failed to file this meritorious issue.

21 *Id.* As is discussed above with respect to Claim 4, this Court reads the reference to
22 “Messiah” as a reference to *Massiah v. United States*, 377 U.S. 201 (1964), in which the
23 Supreme Court held that a defendant’s Sixth Amendment right to counsel is violated
24 when the government introduces statements deliberately elicited by a government agent
25 from an indicted defendant outside the presence of defense counsel. In Claim 19, Emil
26 makes a completely different claim, based upon completely different facts. Emil asserts
27 in Claim 19 that Bono’s testimony was inconsistent with the opinions of Dr. Green, the
28 pathologist who performed the autopsy, and Emil claims that his trial counsel was

1 ineffective for not challenging Bono's testimony with the testimony of Dr. Green. Third
2 Amended Petition, pp. 62-64.

3 Claim 19 does not arise from the same core of operative facts as Ground 4 in
4 Emil's 1997 petition, or any other claim in that petition. Claim 19 is barred by the statute
5 of limitations.

6 **20. Claim 20**

7 In Claim 20, Emil claims that his federal constitutional rights were violated
8 because "[t]rial counsel rendered ineffective assistance by not preparing for, or
9 presenting evidence at, the sentencing hearing...." Third Amended Petition, p. 64.

10 Emil makes no argument that this claim relates back to the 1997 petition, and the
11 Court finds that there was no such claim in the 1997 petition. See Petition for Writ of
12 Habeas Corpus, Respondents' Exhibit 10; *see also* Reply, pp. 36-40.

13 Claim 20 does not arise from the same core of operative facts as any claim in
14 Emil's 1997 petition. Claim 20 is barred by the statute of limitations.

15 **21. Claim 21**

16 Claim 21 is a cumulative error claim. Third Amended Petition, p. 83. Emil
17 incorporates all his other claims into Claim 21, and claims that "[s]hould this Court
18 refuse prejudice from any single error, then this Court must review prejudice from all
19 error collectively." *Id.* at 84.

20 This cumulative error claim is not subject to denial based on the statute of
21 limitations, but, rather, is viable, with respect to the statute of limitations, to the extent
22 that Emil asserts multiple claims (Claims 1, 2, and 3) that are not barred by the statute
23 of limitations.

24 **C. Conclusion Regarding Application of Statute of Limitations**

25 The following of Emil's claims are barred by the statute of limitations, and are
26 subject to denial on that basis: Claims 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,
27 19, and 20.

28 ///

1 **IV. PROCEDURAL DEFAULT**

2 **A. Application of the Procedural Default Doctrine, Generally**

3 In *Coleman v. Thompson*, 501 U.S. 722 (1991), the Supreme Court held that a
4 state prisoner's failure to comply with the state's procedural requirements in presenting
5 his claims is barred from obtaining a writ of habeas corpus in federal court by the
6 adequate and independent state ground doctrine. *Coleman*, 501 U.S. at 731-32 ("Just
7 as in those cases in which a state prisoner fails to exhaust state remedies, a habeas
8 petitioner who has failed to meet the State's procedural requirements for presenting his
9 federal claims has deprived the state courts of an opportunity to address those claims in
10 the first instance"). Where such a procedural default constitutes an adequate and
11 independent state ground for the denial of habeas corpus relief, the default may be
12 excused only if "a constitutional violation has probably resulted in the conviction of one
13 who is actually innocent," or if the prisoner demonstrates cause for the default and
14 prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986).

15 A state procedural bar is "adequate" if it is "clear, consistently applied, and well-
16 established at the time of the petitioner's purported default." *Calderon v. United States*
17 *Dist. Court*, 96 F.3d 1126, 1129 (9th Cir.1996) (quoting *Wells v. Maass*, 28 F.3d 1005,
18 1010 (9th Cir.1994)). A state procedural bar is "independent" if the state court "explicitly
19 invokes the procedural rule as a separate basis for its decision." *Vang v. Nevada*, 329
20 F.3d 1069, 1074 (9th Cir.2003).

21 To demonstrate cause for a procedural default, the petitioner must "show that
22 some objective factor external to the defense impeded" his efforts to comply with the
23 state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external
24 impediment must have prevented the petitioner from raising the claim. See *McCleskey*
25 *v. Zant*, 499 U.S. 467, 497 (1991). With respect to the prejudice prong, the petitioner
26 bears "the burden of showing not merely that the errors [complained of] constituted a
27 possibility of prejudice, but that they worked to his actual and substantial disadvantage,
28 infecting his entire [proceeding] with errors of constitutional dimension." *White v. Lewis*,

1 874 F.2d 599, 603 (9th Cir.1989), *citing United States v. Frady*, 456 U.S. 152, 170
2 (1982).

3 Respondents argue that Claims 1, 2, 3, 4 (in part), 5, 6, 7, 8, 9, 10, 11, 12, 13,
4 14, 15, 16, 17, 18, 19, 20, and 21 are procedurally defaulted. *See Answer*, pp. 50-55.

5 Respondents' position is that Emil's second and third state habeas actions were
6 ruled, by the Nevada Supreme Court, to be barred by adequate and independent state
7 procedural rules, and that, therefore, any claims in this action that were brought in state
8 court only in one or both of those two state-court habeas actions is procedurally
9 defaulted.

10 The Nevada Supreme Court ruled on the appeal in Emil's second state habeas
11 action on December 4, 2001. Order of Affirmance, Respondents' Exhibit 16. The court
12 affirmed the state district court's dismissal of Emil's petition, ruling that the petition was
13 procedurally barred by NRS 34.726 (statute of limitations) and NRS 34.810 (regarding
14 successive petitions). *Id.* The Nevada Supreme Court ruled on the appeal in Emil's third
15 state habeas action on September 24, 2009. Order of Affirmance, Respondents' Exhibit
16 26 (also at Petitioner's Exhibit A). In that case, the court affirmed the state district
17 court's dismissal of Emil's petition, ruling that the petition was procedurally barred by
18 NRS 34.800(2) (laches). *Id.* Therefore, both Emil's second and third state habeas
19 actions were ruled by the Nevada Supreme Court to be procedurally barred.

20 In his response to respondents' procedural default defense, Emil argues that his
21 claims are not barred by the procedural default doctrine "because the Nevada Supreme
22 Court ruled on the merits of Emil's actual innocence claim and because Nevada's
23 procedural default rules are not adequate to prevent this Court from ruling on Emil's
24 claims." Reply, p. 1.

25 Emil's first argument — that the Nevada Supreme Court ruled on the merits of his
26 actual innocence claim — is an argument that the Nevada Supreme Court's application
27 of the state procedural rules was not independent. The Court finds the argument to be
28 without merit.

1 Emil's argument in this regard focuses on the Nevada Supreme Court's Order of
2 Affirmance, dated September 24, 2009. See Reply, pp. 2-3 (*citing* Petitioner's Exhibit A,
3 p. 6). In its September 24, 2009, order, the Nevada Supreme Court affirmed the state
4 district court's denial of Emil's third state habeas petition, on procedural grounds. Order
5 of Affirmance, Petitioner's Exhibit A (also at Respondents' Exhibit 26). In that order, the
6 Nevada Supreme Court addressed the state district court's application of NRS 34.800, a
7 statutory laches provision, to bar Emil's claims. *Id.* at 3-8. The Nevada Supreme Court
8 ruled that Emil did not overcome the presumption of prejudice to the State provided for
9 in NRS 34.800. *Id.* The Nevada Supreme Court also ruled that Emil did not overcome
10 the laches defense by means of a showing of a fundamental miscarriage of justice,
11 which, under Nevada law, requires that "a petitioner must make a colorable showing of
12 actual innocence." *Id.* at 5 (*citing Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519,
13 537 (2001)).

14 Emil's argument concerns the following portion of the Nevada Supreme Court's
15 September 24, 2009 order:

16 It appears that appellant may raise an argument of actual
17 innocence in his brief. It appears that appellant argues he is actually
18 innocent because witness Joseph Henslick recanted his trial testimony.
19 Henslick was in jail with appellant before and during appellant's trial. On
20 the first day of trial, Henslick contacted the State and informed the State
21 that appellant confessed to him and had asked him to lie on the stand. At
22 trial, Henslick testified that appellant told him that appellant shot the victim.
23 [Footnote: Henslick also testified that appellant asked him to testify falsely
24 about a conversation that appellant had with Michael Lefever. Henslick
25 does not appear to recant this testimony. He only appears to recant the
26 testimony he gave regarding appellant confessing to him.] On December
27 20, 2005, Henslick signed a declaration that stated that he lied when he
28 testified that appellant confessed to him. Specifically, the declaration
stated:

1. I testified against Rod Emil in Clark County, Nevada,
in November 1987. Mr. Emil was being prosecuted for
murder.
2. I told the jury that while we were in jail together Rod
Emil confessed to me that he killed a man. This testimony
was not true.
3. While we were in jail together, Rod Emil never told me
he was guilty of anything.

1 4. The District Attorney told me to testify Rod Emil had
2 confessed. I wanted to please the DA, so did as they asked.

3 Appellant fails to meet his burden for an actual innocence claim.
4 Appellant fails to show that "it is more likely than not that no reasonable
5 juror would have convicted him in light of" Henslick's recantation. Even
6 assuming Henslick's recantation was credible, the evidence presented at
7 trial, while not overwhelming, was sufficient to convict appellant without
8 Henslick's testimony. Several witnesses testified that appellant confessed,
9 including Ken Bono, Martin Koba, and Michael Lefever. Further, evidence
10 was presented that Russ Tolley, the victim, was likely killed on March 3, or
11 March 4, 1983, and that appellant was in Las Vegas at that time. Tolley
12 was supposed to have 4 to 5 pounds of marijuana to sell and appellant
13 and his co-defendant Todd Leavitt were supposed to buy it from him. On
14 March 3, 1983, the last time Tolley was seen, he was on his way to sell
15 some marijuana. Moreover, appellant and Leavitt had access to the type
16 of gun that was used to kill the victim. The gun belonged to an employee
17 of Leavitt's father, and was discovered missing on March 3. Shortly after
18 the murder, appellant and Leavitt were seen taking the carpet out of
19 Leavitt's house. They later cleaned the walls of the house and when
20 asked, Leavitt answered it was to get rid of the traces of Tolley's hair.
21 Under these facts, we conclude that the district court did not err in
22 rejecting appellant's actual innocence argument and determining that the
23 petition was procedurally defaulted. Therefore, because appellant failed to
24 rebut the presumption of prejudice to the State, the district court did not err
25 in denying appellant's petition based on laches.

26 Order of Affirmance, Petitioner's Exhibit A (also at Respondents' Exhibit 26), pp. 6-8.
27 Plainly, the Nevada Supreme Court did not there make a ruling on the merits of any
28 federal constitutional claim for habeas corpus relief asserted by Emil. Rather, the
29 Nevada Supreme Court only addressed the question of actual innocence as part of its
30 application of NRS 34.800, that is, to determine whether Emil overcame the procedural
31 bar imposed by that statute. *See Id.*; *see also* Order of Affirmance, Respondents'
32 Exhibit 16, pp. 5-7 (similarly rejecting Emil's actual innocence argument, asserted in an
33 attempt to overcome the procedural bars of NRS 34.726 (statute of limitations) and NRS
34 34.810 (successive petitions), in Emil's second state-court habeas action).

35 Emil cites no authority for the proposition that a state court's consideration of a
36 claim of actual innocence, made in an attempt to overcome a state procedural bar,
37 renders the procedural bar not independent, such that it cannot support application of
38 the procedural default doctrine in federal court.

39 ///

1 Emil's second argument regarding procedural default is that the state-law
2 procedural bars applied by the Nevada Supreme Court are inadequate to support
3 application of the procedural default doctrine in this federal habeas action, because they
4 are inconsistently applied in the state courts. See Reply, pp. 3-24.

5 In affirming the denial of Emil's second state-court habeas petition on procedural
6 grounds, the Nevada Supreme Court grounded its ruling on NRS 34.726, the state-law
7 statute of limitations, and NRS 34.810, which concerns successive petitions. See Order
8 of Affirmance, Respondents' Exhibit 16. In affirming the denial of Emil's third state-court
9 habeas petition on procedural grounds, the Nevada Supreme Court grounded its ruling
10 on NRS 34.800, a statutory laches provision. See Order of Affirmance, Respondents'
11 Exhibit 26 (also at Petitioner's Exhibit A).

12 A state procedural rule is "adequate" if it is "clear, consistently applied, and well-
13 established at the time of the petitioner's purported default." *Calderon*, 96 F.3d at 1129
14 (citation and internal quotation marks omitted); see also *Ford v. Georgia*, 498 U.S. 411,
15 424 (1991) (State procedural rule adequate if it is "firmly established and regularly
16 followed by the time as of which it is to be applied." (citation and internal quotation
17 marks omitted)); *Lambright v. Stewart*, 241 F.3d 1201, 1203 (9th Cir.2001).

18 In *Bennett v. Mueller*, 322 F.3d 573, 585-86 (9th Cir.2003), the court of appeals
19 established a burden-shifting test for analyzing adequacy. Under *Bennett*, the State
20 carries the initial burden of pleading "the existence of an independent and adequate
21 state procedural ground as an affirmative defense." *Bennett*, 322 F.3d at 586. The
22 burden then shifts to the petitioner "to place that defense in issue," which the petitioner
23 may do "by asserting specific factual allegations that demonstrate the inadequacy of the
24 state procedure, including citation to authority demonstrating inconsistent application of
25 the rule." *Id.* If the petitioner meets this burden, "the ultimate burden" of proving the
26 adequacy of the procedural rule rests with the State, which must demonstrate "that the
27 state procedural rule has been regularly and consistently applied in habeas actions."
28 *Id.*; see also *King v. Lamarque*, 464 F.3d 963, 966-67 (9th Cir.2006).

1 In this case, the respondents meet their initial burden under *Bennett* by asserting
2 that the Nevada Supreme Court's application of NRS 34.726, 34.800 and 34.810 in
3 Emil's second and third state-court habeas actions constituted an adequate state
4 procedural ground for denying relief. See Answer, pp. 47-57.

5 In *State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 112 P.3d 1070
6 (2005), the Nevada Supreme Court considered the question whether it had consistently
7 applied the procedural bars codified in NRS 34.726, 34.800, and 34.810, over roughly
8 the same time period when Emil's defaults occurred. The Nevada Supreme Court, in
9 that case, addressed nearly all the arguments made here by Emil, demonstrating that it
10 consistently applied those procedural bars. While the Nevada Supreme Court's ruling in
11 *Riker* is not binding on this Court with respect to the question whether state-law
12 procedural rules are adequate to support application of the procedural default doctrine
13 in this federal habeas action, this Court finds the Nevada Supreme Court's analysis to
14 be persuasive, as, in *Riker*, the Nevada Supreme Court explained its own decisions.

15 In *Moran v. McDaniel*, 80 F.3d 1261 (9th Cir.1996), the Ninth Circuit Court of
16 Appeals addressed the adequacy of Nevada's timeliness rules, NRS 34.726 and NRS
17 34.800, and held that the Nevada Supreme Court "consistently applies its procedural
18 rules to bar review of the merits of an untimely claim in the absence of a showing of
19 cause and lack of prejudice to the State." *Moran v. McDaniel*, 80 F.3d 1261, 1270 (9th
20 Cir.1996). The default at issue in *Moran* occurred in 1992. See *Ybarra v. McDaniel*, 656
21 F.3d 984, 990 (9th Cir.2011) (noting that the default of the petitioner in *Moran* occurred
22 in 1992). The default in that case was, therefore, close in time to Emil's default, as
23 Emil's direct appeal was concluded in 1989, and his first state post-conviction habeas
24 petition was concluded in 1991. See Order Dismissing Appeal, Respondents' Exhibit 4;
25 Order Dismissing Appeal, Respondents' Exhibit 8.

26 Moreover, in *Loveland v. Hatcher*, 231 F.3d 640 (9th Cir.2000), the court of
27 appeals ruled that as of 1993, the Nevada Supreme Court consistently applied NRS
28 34.726. See *Loveland*, 231 F.3d at 643.

1 Another Ninth Circuit Court of Appeals case, decided after establishment of the
2 burden-shifting rules in *Bennett*, instructs that past determinations as to the adequacy of
3 a procedural rule for a given time period are to be accorded deference:

4 In *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir.1998), we held that a
5 petitioner had not met his burden because we had already held the state
6 procedural rule to be consistently applied and the petitioner failed to cite
7 cases demonstrating subsequent inconsistent application. *Id.* at 932. This
8 holding helps prevent inconsistent determinations regarding a state
9 procedural rule's adequacy during a given time period. This same
reasoning provides a firm foundation for applying the *Ortiz* requirement
bilaterally. Once we have found a state procedural rule to be inadequate,
petitioners may fulfill their burden under *Bennett* by simply challenging the
adequacy of the procedure; the burden then shifts back to the government
to demonstrate that the law has subsequently become adequate....

10 This holding is necessary to maintain the primary principle we
11 announced in *Bennett*: the government bears the ultimate burden of
12 establishing the adequacy of a rule. This burden should exist whether or
13 not the petitioner identifies the correct basis upon which to challenge the
14 adequacy of the rule. If we held otherwise, the government could avoid its
15 burden under *Bennett*, and illogical results would occur. Here, for
16 example, we would bar King's claim based on a procedural rule already
found to be inadequate. In essence, we would be holding that the same
rule is adequate in some cases and inadequate in others. This defies
common sense. A procedural rule is either adequate or inadequate during
a given time period; its adequacy does not depend upon the facts of a
petitioner's case.

17 *King v. Lamarque*, 464 F.3d 963, 967-68 (9th Cir.2006). Following the reasoning in
18 *King*, this Court defers to the court of appeals' holdings in *Moran* and *Loveland*, and
19 concludes that during the period between 1989, when Emil's direct appeal was
20 dismissed, and at least 1993, when the default in *Loveland* occurred, the Nevada
21 Supreme Court consistently applied Nevada's statutory procedural bars to post-
22 conviction habeas petitions.

23 Against this legal backdrop, Emil argues that the procedural bars in NRS 34.726,
24 34.800 and 34.810 were inadequate when he defaulted his claims in state court.

25 Emil bases his argument, almost entirely, on arguments discussed at length, and
26 rejected, in the Nevada Supreme Court's *Riker* opinion. See Reply, pp. 8-17. The Court
27 finds Emil's attempts to discredit the Nevada Supreme Court's explanation of its own
28 rulings in "the *Hill* cases," the "*Bennett* cases," "the 'meritless' cases," and "the *Stevens*

1 case,” to be unpersuasive at best. See *id.* In light of *Riker*, *Moran*, and *Loveland*, Emil’s
2 arguments in this regard do not meet his burden, under *Bennett*, to place the procedural
3 default defense in issue, “by asserting specific factual allegations that demonstrate the
4 inadequacy of the state procedure, including citation to authority demonstrating
5 inconsistent application of the rule.” See *Bennett*, 322 F.3d at 586.

6 The one significant argument made by Emil in this regard that is not undermined
7 by *Riker* is Emil’s argument based on the Nevada Supreme Court’s handling of the
8 *Rippo* case. See Reply, pp. 7-8; see also *Rippo v. State*, 122 Nev. 1086, 146 P.3d 279
9 (2006). Emil argues that in the *Rippo* case, on the petitioner’s appeal from denial of
10 habeas corpus relief, the Nevada Supreme Court ignored NRS 34.726, 34.800 and
11 34.810, and *sua sponte* directed the parties to be prepared at oral argument to address
12 a particular issue regarding a penalty-phase jury instruction concerning whether the jury
13 was required to be unanimous in finding that mitigating evidence outweighed
14 aggravating factors such as to preclude death eligibility. See Reply, p. 7. The jury
15 instruction issue was not pled by *Rippo*, the petitioner, in the state district court,
16 because it only arose as part of the reweighing of mitigating evidence and aggravating
17 factors that was necessary to the harmless error analysis of an issue that arose as a
18 result of the Nevada Supreme Court’s decision in *McConnell v. State*, 120 Nev. 1043,
19 102 P.3d 606 (2004), which was decided while the *Rippo* case was pending on appeal.
20 In *Rippo*, the Nevada Supreme Court expressly found “good cause” to entertain the
21 petitioner’s *McConnell* claim, as the legal basis for that claim “was not available at the
22 time [the petitioner] pursued his habeas petition in the district court,” and because the
23 claim “present[ed] questions of law that [did] not require factual determinations outside
24 the record.” *Rippo*, 146 P.3d at 283 (internal citations omitted). Emil’s suggestion that
25 the Nevada Supreme Court circumvented NRS 34.726, 34.800 or 34.810, by raising the
26 jury instruction issue *sua sponte* is misleading, because the jury instruction issue was
27 ancillary to the court’s adjudication of the *McConnell* claim; it was not a free-standing
28 ground for habeas corpus relief. The court’s opinion in *Rippo* shows that the court

1 sought oral argument on the jury instruction issue, and addressed that issue in its
2 opinion, not as a freestanding ground for habeas relief, but because of the issue's
3 impact on the court's harmless error analysis regarding the *McConnell* claim. See
4 *Rippo*, 146 P.3d at 285, 287-88. The Nevada Supreme Court did not, in *Rippo*,
5 arbitrarily overlook NRS 34.726, 34.800 or 34.810, as Emil claims, and *Rippo* is not
6 evidence of inconsistent application of those state procedural rules.

7 Emil has not met his burden to place the procedural default defense in this case
8 in issue, "by asserting specific factual allegations that demonstrate the inadequacy of
9 the state procedure, including citation to authority demonstrating inconsistent
10 application of the rule." See *Bennett*, 322 F.3d at 586. NRS 34.726, 34.800, and 34.810
11 are adequate to support the procedural default defense asserted by respondents.

12 The Court concludes, then, that any claims presented in state court only in Emil's
13 second or third state habeas action, or both, are barred, in this federal habeas corpus
14 action, by the procedural default doctrine.

15 **B. Application of the Procedural Default Doctrine to Individual Claims**

16 **1. Claim 1**

17 In Claim 1 of his third amended habeas petition, Emil claims that his federal
18 constitutional rights were violated "because the jury foreman presided while unfit for jury
19 service," in that "a motion to revoke his probation hung over his head throughout the
20 trial." Third Amended Petition, p. 5.

21 Emil asserted a related claim on his direct appeal; that claim, however, was
22 fundamentally different, in that Emil did not there claim a violation of his federal
23 constitutional rights. See Appellant's Opening Brief, Respondents' Exhibit 3A, pp. 21-23;
24 Appellant's Reply Brief, Respondents' Exhibit 3C, pp. 10-13.

25 Emil first presented this claim in state court, as a claimed federal constitutional
26 violation, in his second state habeas action, in 1999. See Petition for Writ of Habeas
27 Corpus, Respondents' Exhibit 13, pp. 6-8. Emil again presented this claim in state court
28 in his third state habeas action, in 2006. See Petition for Writ of Habeas Corpus,

1 Respondents' Exhibit 25, pp. 43-46. As is discussed above, however, Emil's second
2 and third state habeas actions were ruled barred under adequate and independent
3 Nevada procedural rules.

4 As Emil raised this claim in state court only in his second and third state habeas
5 actions, it is procedurally defaulted, and is subject to denial on that ground.

6 **2. Claim 2**

7 In Claim 2, Emil claims that his federal constitutional rights were violated when
8 the trial court "instructed the jury on the state's theory of aiding and abetting," because
9 "[t]he trial court allowed the state to argue that theory even though the state failed to
10 provide any pre-trial notice of prosecution for aiding and abetting." Third Amended
11 Petition, p. 7.

12 Emil asserted a related claim on his direct appeal, but, here again, Emil did not
13 there claim a violation of his federal constitutional rights. See Appellant's Opening Brief,
14 Respondents' Exhibit 3A, pp. 15-18; Appellant's Reply Brief, Respondents' Exhibit 3C,
15 pp. 4-9. Emil did, in that claim on his direct appeal, assert that the State's reliance on
16 the aiding and abetting theory violated his "due process rights," generally, but he did not
17 specifically claim a violation of his federal constitutional right to due process of law. A
18 claim has been fairly presented to the state court if the petitioner has described both the
19 operative facts and the federal legal theory on which the claim is based. *Tamalini v.*
20 *Stewart*, 249 F.3d 895, 898-99 (9th Cir.2001); *Bland v. Cal. Dep't of Corrections*, 20
21 F.3d 1469, 1472-73 (9th Cir.1994), overruled on other grounds by *Schell v. Witek*, 218
22 F.3d 1017, 1025 (9th Cir.2000) (en banc). "Our rule is that a state prisoner has not 'fairly
23 presented' (and thus exhausted) his federal claims in state court unless he specifically
24 indicated to that court that those claims were based on federal law." *Lyons v. Crawford*,
25 232 F.3d 666, 668 (9th Cir.2000), amended on other grounds, 247 F.3d 904 (9th
26 Cir.2001). "If a petitioner fails to alert the state court to the fact that he is raising a
27 federal constitutional claim, his federal claim is unexhausted regardless of its similarity
28 to the issues raised in state court." *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir.1996).

1 “[G]eneral appeals to broad constitutional principles, such as due process, equal
2 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hivala v.*
3 *Wood*, 195 F.3d 1098, 1106 (9th Cir.1999) (*citing Gray v. Netherland*, 518 U.S. 152,
4 162-63 (1996)). Under well-established Ninth Circuit precedent, this court cannot
5 consider Emil to have raised this claim on his direct appeal.

6 Emil first presented this claim in state court, as a claimed federal constitutional
7 violation, in his second state habeas action. See Petition for Writ of Habeas Corpus,
8 Respondents’ Exhibit 13, pp. 8-11. Emil again presented this claim in state court in his
9 third state habeas action. See Petition for Writ of Habeas Corpus, Respondents’ Exhibit
10 25, pp. 46-50. As is discussed above, however, Emil’s second and third state habeas
11 actions were ruled barred under adequate and independent Nevada procedural rules.

12 As Emil raised this claim in state court only in his second and third state habeas
13 actions, it is procedurally defaulted, and is subject to denial on that ground.

14 3. Claim 3

15 In Claim 3, Emil claims that his federal constitutional rights were violated
16 because the prosecution, in violation of the rules of *Napue v. Illinois*, 360 U.S. 264
17 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972), “instructed Joseph Henslick to
18 testify falsely and provided benefits for that testimony.” Third Amended Petition, p. 11.

19 Emil asserted a related claim on his direct appeal, but, again, Emil did not there
20 claim a violation of his federal constitutional rights. See Appellant’s Opening Brief,
21 Respondents’ Exhibit 3A, pp. 19-20; Appellant’s Reply Brief, Respondents’ Exhibit 3C,
22 pp. 9-10. On his direct appeal, Emil asserted only that Henslick’s testimony violated his
23 “due process rights,” generally; he did not specifically claim a violation of his federal
24 constitutional right to due process of law. Therefore, Emil did not properly present Claim
25 3 on his direct appeal. See discussion, above, regarding Claim 2.

26 Emil first presented this claim in state court, as a claimed federal constitutional
27 violation, in his second state habeas action. See Petition for Writ of Habeas Corpus,
28 Respondents’ Exhibit 13, pp. 11-13. Emil again presented this claim in state court in his

1 third state habeas action. See Petition for Writ of Habeas Corpus, Respondents' Exhibit
2 25, pp. 51-56. As is discussed above, however, Emil's second and third state habeas
3 actions were ruled barred under adequate and independent Nevada procedural rules.

4 As Emil raised this claim in state court only in his second and third state habeas
5 actions, it is procedurally defaulted, and is subject to denial on that ground.

6 4. Claim 4

7 In Claim 4, Emil claims that his federal constitutional rights were violated
8 because his trial counsel rendered ineffective assistance "when he neglected Mr. Emil's
9 case prior to trial and refused to ask appropriate and productive questions during trial."
10 Third Amended Petition, p. 17. There are several subclaims in Claim 4: that counsel
11 "refused to examine witnesses on topics Mr. Emil suggested" (*id.* at 17); that counsel
12 "refused questions about the orange truck" (*id.*); that counsel "refused to develop a
13 description of Bobby Little's gun" (*id.* at 19); that counsel "refused to object to testimony
14 from Ken Bono" (*id.* at 20); that counsel "refused to object to hearsay testimony from
15 Terry Bono" (*id.* at 21); that counsel "refused to cross-examine Victor Gramrosa for
16 bias" (*id.* at 22); and that counsel "refused to collect Lefevre's jail records prior to trial"
17 (*id.* at 23).

18 Respondents argue that two of the subclaims in Claim 4 – the subclaim regarding
19 the cross-examination of Victor Gramrosa, and the subclaim regarding Michael Stewart
20 Lefevre's jail records – are procedurally defaulted. See Answer, p. 51.

21 Emil did not raise his claims of ineffective assistance of trial counsel, relative to
22 the cross-examination of Victor Gramrosa or Michael Stewart Lefevre's jail records, on
23 his direct appeal or in his first state habeas action. See Respondents' Exhibits 3A, 3C,
24 5, 6. Nor did Emil raise any such claims in his second state habeas action. See
25 Respondents' Exhibit 13.

26 Emil first presented these claims in state court in his third state habeas action.
27 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 25, pp. 59-63. As is

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1 discussed above, however, Emil's third state habeas action was ruled barred under
2 adequate and independent Nevada procedural rules.

3 As Emil raised these claims — his claims of ineffective assistance of trial counsel,
4 relative to the cross-examination of Victor Gramrosa and relative to Michael Stewart
5 Lefevre's jail records — in state court only in his third state habeas action, they are
6 procedurally defaulted, and subject to denial on that ground.

7 **5. Claim 5**

8 In Claim 5, Emil claims that his federal constitutional rights were violated
9 because his trial counsel rendered ineffective assistance "when he failed to support Mr.
10 Emil's alibi with documentary proof from Merlin Leavitt and with evidence of weather
11 conditions." Third Amended Petition, p. 26.

12 Emil did not raise this claim on his direct appeal or in his first state habeas action.
13 See Respondents' Exhibits 3A, 3C, 5, 6.

14 Emil first presented this claim in state court in his second state habeas action.
15 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 15-20. Emil again
16 presented this claim in state court in his third state habeas action. See Petition for Writ
17 of Habeas Corpus, Respondents' Exhibit 25, pp. 64-70. As is discussed above,
18 however, Emil's second and third state habeas actions were ruled barred under
19 adequate and independent Nevada procedural rules.

20 As Emil raised this claim in state court only in his second and third state habeas
21 actions, it is procedurally defaulted, and is subject to denial on that ground.

22 **6. Claim 6**

23 In Claim 6, Emil claims that his federal constitutional rights were violated
24 because his trial counsel rendered ineffective assistance "when he failed to file a motion
25 to preclude the prosecutor from eliciting testimony regarding the 'bad acts/crimes'
26 allegedly committed by Mr. Emil's alibi witness which were not relevant to the
27 'truthfulness' of the alibi witness." Third Amended Petition, p. 31.

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1 Emil did not raise this claim on his direct appeal or in his first state habeas action.
2 See Respondents' Exhibits 3A, 3C, 5, 6.

3 Emil first presented this claim in state court in his second state habeas action.
4 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 21-25. Emil again
5 presented this claim in state court in his third state habeas action. See Petition for Writ
6 of Habeas Corpus, Respondents' Exhibit 25, pp. 70-75. As is discussed above,
7 however, Emil's second and third state habeas actions were ruled barred under
8 adequate and independent Nevada procedural rules.

9 As Emil raised this claim in state court only in his second and third state habeas
10 actions, it is procedurally defaulted, and is subject to denial on that ground.

11 **7. Claim 7**

12 In Claim 7, Emil claims that his federal constitutional rights were violated
13 because "[t]he state charged Mr. Emil in the Tolley case to gain a tactical advantage in
14 the Charles Emil case...." Third Amended Petition, p. 34.

15 Emil did not raise this claim on his direct appeal or in his first state habeas action.
16 See Respondents' Exhibits 3A, 3C, 5, 6.

17 Emil first presented this claim in state court in his second state habeas action.
18 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 25-30. Emil again
19 presented this claim in state court in his third state habeas action. See Petition for Writ
20 of Habeas Corpus, Respondents' Exhibit 25, pp. 75-80. As is discussed above,
21 however, Emil's second and third state habeas actions were ruled barred under
22 adequate and independent Nevada procedural rules.

23 As Emil raised this claim in state court only in his second and third state habeas
24 actions, it is procedurally defaulted, and is subject to denial on that ground.

25 **8. Claim 8**

26 In Claim 8, Emil claims that his federal constitutional rights were violated
27 because "[t]he trial court admitted gruesome photographs" into evidence at trial. Third
28 Amended Petition, p. 38.

1 Emil did not raise this claim on his direct appeal or in his first state habeas action.
2 See Respondents' Exhibits 3A, 3C, 5, 6.

3 Emil first presented this claim in state court in his second state habeas action.
4 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 31-34. Emil again
5 presented this claim in state court in his third state habeas action. See Petition for Writ
6 of Habeas Corpus, Respondents' Exhibit 25, pp. 80-83. As is discussed above,
7 however, Emil's second and third state habeas actions were ruled barred under
8 adequate and independent Nevada procedural rules.

9 As Emil raised this claim in state court only in his second and third state habeas
10 actions, it is procedurally defaulted, and is subject to denial on that ground.

11 **9. Claim 9**

12 In Claim 9, Emil claims that his federal constitutional rights were violated
13 because "[t]he state destroyed exculpatory evidence to gain a tactical advantage...."
14 Third Amended Petition, p. 40. More specifically, Emil asserts in this claim that
15 "[d]etectives for the Las Vegas Metropolitan Police Department knowingly destroyed,
16 prior to trial, two audio tapes and all notes that preserved exculpatory information from
17 interviews of state's key witness Ken Bono." *Id.* at 40-41.

18 Emil did not raise this claim on his direct appeal or in his first state habeas action.
19 See Respondents' Exhibits 3A, 3C, 5, 6.

20 Emil first presented this claim in state court in his second state habeas action.
21 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 37-41. Emil again
22 presented this claim in state court in his third state habeas action. See Petition for Writ
23 of Habeas Corpus, Respondents' Exhibit 25, pp. 87-92. As is discussed above,
24 however, Emil's second and third state habeas actions were ruled barred under
25 adequate and independent Nevada procedural rules.

26 As Emil raised this claim in state court only in his second and third state habeas
27 actions, it is procedurally defaulted, and is subject to denial on that ground.

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1 **10. Claim 10**

2 In Claim 10, Emil claims that his federal constitutional rights were violated
3 because “[t]he state failed to disclose potential exculpatory evidence.” Third Amended
4 Petition, p. 44. Specifically, Emil asserts in this claim that the prosecution failed to
5 disclose information about witness Martin Koba. *Id.* at 44-46.

6 Emil did not raise this claim on his direct appeal or in his first state habeas action.
7 See Respondents’ Exhibits 3A, 3C, 5, 6.

8 Emil first presented this claim in state court in his second state habeas action.
9 See Petition for Writ of Habeas Corpus, Respondents’ Exhibit 13, pp. 41-43. Emil again
10 presented this claim in state court in his third state habeas action. See Petition for Writ
11 of Habeas Corpus, Respondents’ Exhibit 25, pp. 92-95. As is discussed above,
12 however, Emil’s second and third state habeas actions were ruled barred under
13 adequate and independent Nevada procedural rules.

14 As Emil raised this claim in state court only in his second and third state habeas
15 actions, it is procedurally defaulted, and is subject to denial on that ground.

16 **11. Claim 11**

17 In Claim 11, Emil claims that his federal constitutional rights were violated
18 because “[t]he trial court refused to instruct on the lesser included and related offenses
19 of conspiracy to commit murder, battery, and accessory after the fact even though
20 evidence in the record supported such convictions and trial counsel explicitly waived the
21 statute of limitations.” Third Amended Petition, p. 46.

22 Emil asserted a related claim on his direct appeal, but Emil did not there claim a
23 violation of his federal constitutional rights. See Appellant’s Opening Brief,
24 Respondents’ Exhibit 3A, pp. 12-14; Appellant’s Reply Brief, Respondents’ Exhibit 3C,
25 pp. 3-4.

26 Emil first presented this claim in state court, as a claimed federal constitutional
27 violation, in his second state habeas action. See Petition for Writ of Habeas Corpus,
28 Respondents’ Exhibit 13, pp. 44-47. Emil again presented this claim in state court in his

1 third state habeas action. See Petition for Writ of Habeas Corpus, Respondents' Exhibit
2 25, pp. 95-98. As is discussed above, however, Emil's second and third state habeas
3 actions were ruled barred under adequate and independent Nevada procedural rules.

4 As Emil raised this claim in state court only in his second and third state habeas
5 actions, it is procedurally defaulted, and is subject to denial on that ground.

6 **12. Claim 12**

7 In Claim 12, Emil claims that his federal constitutional rights were violated
8 because "[t]he trial court instructed the jury on reasonable doubt in a manner that
9 minimized the state's burden of proof..." Third Amended Petition, p. 48.

10 Emil did not raise this claim on his direct appeal or in his first state habeas action.
11 See Respondents' Exhibits 3A, 3C, 5, 6.

12 Emil first presented this claim in state court in his second state habeas action.
13 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 47-49. Emil again
14 presented this claim in state court in his third state habeas action. See Petition for Writ
15 of Habeas Corpus, Respondents' Exhibit 25, pp. 98-101. As is discussed above,
16 however, Emil's second and third state habeas actions were ruled barred under
17 adequate and independent Nevada procedural rules.

18 As Emil raised this claim in state court only in his second and third state habeas
19 actions, it is procedurally defaulted, and is subject to denial on that ground.

20 **13. Claim 13**

21 In Claim 13, Emil claims that his federal constitutional rights were violated
22 because "[t]he trial court instructed the jury to do 'equal and exact justice' between the
23 state and Mr. Emil, which reduced the state's burden of proof" Third Amended
24 Petition, p. 50.

25 Emil did not raise this claim on his direct appeal or in his first state habeas action.
26 See Respondents' Exhibits 3A, 3C, 5, 6.

27 Emil first presented this claim in state court in his second state habeas action.
28 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 49-51. Emil again

1 presented this claim in state court in his third state habeas action. See Petition for Writ
2 of Habeas Corpus, Respondents' Exhibit 25, pp. 101-02. As is discussed above,
3 however, Emil's second and third state habeas actions were ruled barred under
4 adequate and independent Nevada procedural rules.

5 As Emil raised this claim in state court only in his second and third state habeas
6 actions, it is procedurally defaulted, and is subject to denial on that ground.

7 **14. Claim 14**

8 In Claim 14, Emil claims that his federal constitutional rights were violated
9 because "[t]he trial court failed to properly instruct the jury on the elements of first
10 degree murder..." Third Amended Petition, p. 51. This claim has two discrete parts.
11 First, Emil claims that "[t]he trial court misstated the law in the instructions that defined
12 premeditation and deliberation." *Id.* at 52. Second, Emil claims that the "malice
13 aforethought" instruction "relieved the state of the burden to prove each element of the
14 offense beyond a reasonable doubt." *Id.* at 54.

15 Emil did not raise this claim on his direct appeal or in his first state habeas action.
16 See Respondents' Exhibits 3A, 3C, 5, 6.

17 Emil first presented this claim in state court in his second state habeas action.
18 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 51-55. Emil again
19 presented this claim in state court in his third state habeas action. See Petition for Writ
20 of Habeas Corpus, Respondents' Exhibit 25, pp. 103-07. As is discussed above,
21 however, Emil's second and third state habeas actions were ruled barred under
22 adequate and independent Nevada procedural rules.

23 As Emil raised this claim in state court only in his second and third state habeas
24 actions, it is procedurally defaulted, and is subject to denial on that ground.

25 **15. Claim 15**

26 In Claim 15, Emil claims that "[e]xtensive prosecutorial misconduct and
27 overreaching distorted the fact-finding process, rendered the trial fundamentally unfair
28 ..." and violated his federal constitutional rights. Third Amended Petition, p. 55.

1 Emil did not raise this claim on his direct appeal or in his first state habeas action.
2 See Respondents' Exhibits 3A, 3C, 5, 6.

3 Emil first presented this claim in state court in his second state habeas action.
4 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 55-59. Emil again
5 presented this claim in state court in his third state habeas action. See Petition for Writ
6 of Habeas Corpus, Respondents' Exhibit 25, pp. 107-11. As is discussed above,
7 however, Emil's second and third state habeas actions were ruled barred under
8 adequate and independent Nevada procedural rules.

9 As Emil raised this claim in state court only in his second and third state habeas
10 actions, it is procedurally defaulted, and is subject to denial on that ground.

11 **16. Claim 16**

12 In Claim 16, Emil claims that his federal constitutional rights were violated
13 because "[t]he trial court refused to record significant portions of trial which denied Mr.
14 Emil meaningful appellate review..." Third Amended Petition, p. 58.

15 Emil did not raise this claim on his direct appeal or in his first state habeas action.
16 See Respondents' Exhibits 3A, 3C, 5, 6.

17 Emil first presented this claim in state court in his second state habeas action.
18 See Petition for Writ of Habeas Corpus, Respondents' Exhibit 13, pp. 60-61. Emil again
19 presented this claim in state court in his third state habeas action. See Petition for Writ
20 of Habeas Corpus, Respondents' Exhibit 25, pp. 112-14. As is discussed above,
21 however, Emil's second and third state habeas actions were ruled barred under
22 adequate and independent Nevada procedural rules.

23 As Emil raised this claim in state court only in his second and third state habeas
24 actions, it is procedurally defaulted, and is subject to denial on that ground.

25 **17. Claim 17**

26 In Claim 17, Emil claims that his federal constitutional rights were violated
27 because "[a]ppellate counsel rendered ineffective assistance." Third Amended Petition,
28 p. 60. Emil claims that his appellate counsel "unreasonably failed to litigate the facts

1 and legal issues enunciated [in] claims No. 6 through 8, part of 11 and 12 through 16
2 and 18....” *Id.*

3 Emil did not raise any such claim on his direct appeal or in his first state habeas
4 action. See Respondents’ Exhibits 3A, 3C, 5, 6.

5 Emil first presented this claim in state court in his second state habeas action.
6 See Petition for Writ of Habeas Corpus, Respondents’ Exhibit 13, pp. 61-62. Emil again
7 presented this claim in state court in his third state habeas action. See Petition for Writ
8 of Habeas Corpus, Respondents’ Exhibit 25, pp. 114-16. As is discussed above,
9 however, Emil’s second and third state habeas actions were ruled barred under
10 adequate and independent Nevada procedural rules.

11 As Emil raised this claim in state court only in his second and third state habeas
12 actions, it is procedurally defaulted, and is subject to denial on that ground.

13 **18. Claim 18**

14 In Claim 18, Emil claims that “[t]he trial court’s admission of hearsay violated the
15 federal constitutional guarantees of due process, effective assistance of counsel, right
16 to confrontation and cross-examination.” Third Amended Petition, p. 61.

17 Emil did not raise any such claim on his direct appeal, in his first state habeas
18 action, or in his second state habeas action. See Respondents’ Exhibits 3A, 3C, 5, 6,
19 13.

20 Emil presented this claim in state court in his third state habeas action. See
21 Petition for Writ of Habeas Corpus, Respondents’ Exhibit 25, pp. 117-19. As is
22 discussed above, however, Emil’s third state habeas action was ruled barred under
23 adequate and independent Nevada procedural rules.

24 As Emil raised this claim in state court only in his third state habeas action, it is
25 procedurally defaulted, and is subject to denial on that ground.

26 **19. Claim 19**

27 In Claim 19, Emil claims that his federal constitutional rights were violated
28 because his trial counsel rendered ineffective assistance because “[t]rial counsel failed

1 to challenge the testimony of Ken Bono with the testimony of Dr. Green....” Third
2 Amended Petition, p. 62.

3 Emil did not raise any such claim on his direct appeal, in his first state habeas
4 action, or in his second state habeas action. See Respondents’ Exhibits 3A, 3C, 5, 6,
5 13.

6 Emil presented this claim in state court in his third state habeas action. See
7 Petition for Writ of Habeas Corpus, Respondents’ Exhibit 25, pp. 120-22. As is
8 discussed above, however, Emil’s third state habeas action was ruled barred under
9 adequate and independent Nevada procedural rules.

10 As Emil raised this claim in state court only in his third state habeas action, it is
11 procedurally defaulted, and is subject to denial on that ground.

12 **20. Claim 20**

13 In Claim 20, Emil claims that his federal constitutional rights were violated
14 because “[t]rial counsel rendered ineffective assistance by not preparing for, or
15 presenting evidence at, the sentencing hearing....” Third Amended Petition, p. 64.

16 Emil did not raise any such claim on his direct appeal, in his first state habeas
17 action, or in his second state habeas action. See Respondents’ Exhibits 3A, 3C, 5, 6,
18 13.

19 Emil presented this claim in state court in his third state habeas action. See
20 Petition for Writ of Habeas Corpus, Respondents’ Exhibit 25, pp. 122-72. As is
21 discussed above, however, Emil’s third state habeas action was ruled barred under
22 adequate and independent Nevada procedural rules.

23 As Emil raised this claim in state court only in his third state habeas action, it is
24 procedurally defaulted, and is subject to denial on that ground.

25 **21. Claim 21**

26 Claim 21 is a cumulative error claim. Third Amended Petition, p. 83. Emil
27 incorporates all his other claims into Claim 21, and claims that “[s]hould this Court

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1 refuse prejudice from any single error, then this Court must review prejudice from all
2 error collectively." *Id.* at 84.

3 This cumulative error claim is not subject to denial based on the procedural
4 default doctrine, but, rather, is viable, with respect to the procedural default doctrine, to
5 the extent that Emil asserts multiple claims that are not barred by that doctrine (the
6 parts of Claim 4 not barred by the procedural default doctrine).

7 **C. Conclusion Regarding Application of Procedural Default Doctrine**

8 The following of Emil's claims are barred by the procedural default doctrine, and
9 are subject to denial on that basis: Claims 1, 2, 3, 4 (to the extent based on trial
10 counsel's alleged failure cross-examine Victor Gramrosa for bias and alleged failure to
11 collect Lefevre's jail records prior to trial), 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,
12 19, and 20.

13 **V. CONCLUSION**

14 Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 are
15 all subject to denial based on the statute of limitations or the procedural default doctrine,
16 or both.

17 As Emil presents no procedurally viable claims, his cumulative error claim, Claim
18 21, fails, and is subject to denial as well.

19 As all of Emil's claims are subject to denial on procedural grounds, the Court
20 does not reach the merits of any of Emil's claims.

21 The standard for issuance of a certificate of appealability calls for a "substantial
22 showing of the denial of a constitutional right." 28 U.S.C. §2253(c). Where claims are
23 denied on procedural grounds, the Supreme Court has interpreted 28 U.S.C. §2253(c)
24 as follows:

25 When the district court denies a habeas petition on procedural grounds
26 without reaching the prisoner's underlying constitutional claim, a COA
27 should issue when the prisoner shows, at least, that jurists of reason
28 would find it debatable whether the petition states a valid claim of the
denial of a constitutional right and that jurists of reason would find it
debatable whether the district court was correct in its procedural ruling.


1 *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S.
2 322 (2003); *James v. Giles*, 221 F.3d 1074, 1077-79 (9th Cir.2000). The Court has
3 considered the procedural issues addressed in this order, with respect to whether they
4 satisfy the standard for issuance of a certificate of appeal, and the Court determines
5 that none do. The Court will deny Emil a certificate of appealability.

6 It is therefore ordered that petitioner's third amended petition for writ of habeas
7 corpus (dkt. no. 49) is denied.

8 It is further ordered that petitioner is denied a certificate of appealability.

9 It is further ordered that the Clerk shall enter judgment accordingly.

10 DATED THIS 20th day of February 2014.

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13 _____
14 MIRANDA M. DU
15 UNITED STATES DISTRICT JUDGE
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